

Paula K. Jacobi, Esq. (IL Bar No. 1311247)
Andrew J. Abrams, Esq. (IL Bar No. 6271836)
SUGAR FRIEDBERG & FELSENTHAL LLP
30 North LaSalle Street, Suite 3000
Chicago, Illinois 60602
Telephone: 312-704-9400
Email: pjacobi@sff-law.com
aabrams@sff-law.com

Robert Kinas, Esq. (NV Bar No. 6019)
Mark Konrad, Esq. (NV Bar No. 4462)
SNELL & WILMER
3800 Howard Hughes Parkway, Suite 1000
Las Vegas, Nevada 89169
Telephone: 702.784.5203
Email: rkinas@swlaw.com

Attorneys for Norman Kiven

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA**

In re:) Case No. BK-S-06-10725 LBR
USA COMMERCIAL MORTGAGE COMPANY,	<u>Debtor</u>) Case No. BK-S-06-10726 LBR
In re:) Case No. BK-S-06-10727 LBR
USA CAPITAL REALTY ADVISORS, LLC,	<u>Debtor</u>) Case No. BK-S-06-10728 LBR
In re:) Case No. BK-S-06-10729 LBR
USA CAPITAL DIVERSIFIED TRUST DEED FUND, LLC,	<u>Debtor</u>))
In re:))
USA CAPITAL FIRST TRUST DEED FUND, LLC,	<u>Debtor</u>))
In re:))
USA SECURITIES, LLC	<u>Debtor</u>))
Affects:))
<input checked="" type="checkbox"/> All Debtors))
USA Commercial Mortgage Company))
USA Securities, LLC))
USA Capital Realty Advisors, LLC))

DIRECT LENDER KIVEN'S OPPOSITION TO DEBTORS' MOTION TO DISTRIBUTE FUNDS

Snell & Wilmer LLP LAW OFFICES
3800 HOWARD HUGHES PARKWAY, SUITE
LAS VEGAS, NEVADA 89169
(702) 784-5200

1 USA Capital Diversified Trust Deed Fund, LLC) Date: August 4, 2006
 2 USA First Trust Deed Fund, LLC) Time: 9:30 a.m.

3 Norman Kiven (“Kiven”) opposes Debtors’ Motion to Distribute Funds and to Grant
 4 Ordinary-Course Releases and Distribute Proceeds (the “Motion”) filed by debtor USA
 5 Commercial Mortgage Company (“USA Commercial”) and the related captioned debtors
 6 (collectively, “Debtors”) as follows:

7 **INTRODUCTION**

8 The Motion is without legal merit. While USA Commercial is contractually obligated to
 9 pay over to Kiven all distributions made on the Kiven Direct Loans, and Kiven demands such
 10 immediate turnover, Debtors have no legal or equitable right to seize the first \$48,248 of those
 11 distributions and not deliver them to Kiven. In short, Debtors are attempting to seize property
 12 that admittedly belongs to Kiven and not Debtors, without right or due process. This Court has
 13 no authority to authorize this seizure.

14 Kiven, an elderly individual, lent over \$1 million to approximately twelve borrowers, and
 15 not to USA Commercial or any of the other Debtors, through a set of loans (the “Kiven Direct
 16 Loans”).¹ USA Commercial contractually agreed to serve as servicing agent on the Kiven Direct
 17 Loans. As a Direct Lender, Kiven owns the Kiven Direct Loans. And as the owner of the Kiven
 18 Direct Loans, Kiven has the sole right to payment made by the borrowers on those Loans, not
 19 Debtors.² It is Kiven who holds all other rights as a Direct Lender in the underlying loans,
 20 promissory notes, and securing deeds of trust and mortgages. Any interest payments that the
 21 borrowers make on Kiven Direct Loans are the property of Kiven. USA Commercial has a
 22 contractual right to a servicing fee related to the Kiven Direct Loan, but nothing more. To the

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 26 ¹ The last account statement that Kiven received from USA Commercial identified the following twelve borrowers:
 27 Anchor B, LLC, Castaic Partners III, ComVest Capital, Cornman Toltec 160, Fiesta USA/Stoneridge, Foxhill 216,
 28 LLC, Gateway Stone, HFA-North Yonkers, Marquis Hotel, Mountain House, Ocean Atlantic, and Palm Harbor One
 (the “Kiven Direct Loans”). Kiven is also a Direct Lender on the Bundy Canyon loan, which Debtors advise did not
 close prior to the Petition Date. Investigation continues as to whether Kiven is a Direct Lender on any other loans.

² Kiven’s rights are pro-rata with the other Direct Lenders that own the given Loans.

1 extent the Kiven Direct Loans are paid off, Kiven owns those proceeds, not Debtors. USA
 2 Commercial, as servicing agent, is nothing more than a conduit for the payments made by
 3 borrowers on Direct Loans to the Direct Lenders.

4 The auspicious title of “Motion to Distribute Funds” belies the relief Debtors are actually
 5 requesting: the seizure, attachment, and then use of Kiven’s property. Debtors ask this Court to
 6 authorize the seizure of up to \$48,248 in payments and/or proceeds made on Kiven Direct Loans
 7 that USA Commercial, as servicer, received as Kiven’s agent both before and after the Petition
 8 Date. Debtors justify the seizure as a purported “setoff” of \$48,248 that Debtors claim they have
 9 a legal right to recover from Kiven. Debtors acknowledge that they are holding proceeds of the
 10 Kiven Direct Loans, but seek Court permission to keep those funds for Debtors’ estates. No
 11 adversary proceeding has been filed against Kiven; no adjudication has been made that Kiven
 12 owes one cent to Debtors’ estate. No evidence has been submitted to the Court or produced to
 13 Kiven to show that Debtors even hold a cognizable claim against Kiven.

14 In making this request, Debtors ask this Court to deprive Kiven of due process and
 15 contravene the United States Supreme Court’s holding in *Grupo Mexicano de Desarrollo, S.A. v.*
 16 *Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999), in which the Court prohibited a pre-judgment
 17 attachment of property. Debtors’ request is even more egregious than the relief sought in *Grupo*.
 18 In *Grupo*, at least a complaint against the defendant was pending. Debtors have not even filed a
 19 pleading (which must be done as an adversary) asserting a claim against Kiven.

20 The extraordinary relief Debtors seek is done without any evidentiary support. Instead,
 21 Debtors take the “trust us” approach which wholly ignores the need to file a complaint and then
 22 meet the evidentiary burdens once a complaint is ever filed. Such actions violate Debtors’ rights
 23 to due process of law, and the “equitable circumstances” that Debtors claim justify their seizure

1 of Kiven's property, have no basis in law. This Court simply has no legal right or ability to grant
 2 the relief requested in the Motion.

3 **ARGUMENT**

4 **I. This Court Does Not Have Authority to Authorize Debtors to Seize
 5 Kiven's Property Before Debtors' Alleged Potential Claims
 6 Are Legally Asserted and Brought to Judgment**

7 Bankruptcy Rule 7001(1) requires that an adversary proceeding be initiated to recover
 8 money or property. If Debtors believe they have some claim against Kiven, then Debtors must
 9 file an adversary proceeding to assert that claim. Debtors cite to no law that allows them to side
 10 step such a procedure.

11 Even if Debtors were to bring such an adversary action, they would have no right to the
 12 relief requested in the Motion, *i.e.* the seizure of the Kiven Direct Loan proceeds. The Supreme
 13 Court ruled in *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308
 14 (1999), that it is beyond the power of the courts to enjoin a defendant from transferring its assets
 15 prior to entry of any judgment in favor of plaintiffs on their contract claims for money damages.
 16 The Supreme Court chose to "follow the well-established general rule that *a judgment*
 17 *establishing the debt was necessary* before a court of equity would interfere with the debtor's use
 18 of his property." *Id.* at 321 (emphasis added). Where a general creditor (*i.e.*, one without a
 19 judgment) does not have a "cognizable interest, either at law or in equity, in the property of his
 20 debtor," the creditor, under this general rule, cannot interfere with the debtor's use of that
 21 property. *Id.* at 320.³

22 Kiven recognizes that if an adversary proceeding were ever filed against Kiven, Debtors
 23 would have a right under Nevada's pre-judgment attachment statute, made applicable by Rule 64
 24 of the Federal Rules of Civil Procedure and Bankruptcy Rule 7064, to attempt such a seizure.

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 28 ³ It is not in dispute that the funds USA Commercial collects from borrowers as agent for the Direct Lenders are not
 property of Debtors' estates.

1 However, none of the grounds for attachment, either with or without notice and hearing, under
 2 NRS 31.013 and NRS 31.017 would apply.

3 Debtors admit that they have no interest (equitable or otherwise) in payments made by
 4 borrowers on the Kiven Direct Loans.⁴ Yet, Debtors request that this Court authorize them to
 5 seize property that does not belong to them and apply that property to satisfy an alleged claim
 6 against Kiven for \$48,248 that has never been asserted or proven. Debtors must first bring their
 7 Complaint against Kiven before such seizure could *ever* be ordered.

9 **II. Debtors Fail To Allege In Their Motion Any Viable Causes of Action
 10 Against Kiven And No Evidence To Support Any Claim**

11 Debtors posit several legal theories in their Motion that *may* support a claim against
 12 Kiven. None have merit.

13 Debtors' recoupment theory fails because Debtors are attempting to collapse all of the
 14 Direct Loans into a single transaction. This extension goes far beyond the "flexible meaning" for
 15 "transaction" that Debtors claim in their Motion. As a matter of fact, the various Direct Loans
 16 could never be considered a part of the same "transaction." The property involved with each
 17 Direct Loan is unique; the time when each Direct Loan comes due is different; the parties to each
 18 Direct Loan are different; and the status (in terms of payments, property condition etc.) of the
 19 property and borrower of each Direct Loan are unique. In short, factually each Direct Loan is its
 20 own transaction, with its own unique lenders, unique borrowers and unique real property.
 21 Debtors' argument is akin to a company attempting to declare that all of its pre-petition sales of
 22 product were a single "transaction" because the product sold and documentation for each sale was
 23 the same. No law supports such a proposition.

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 27 ⁴ To the extent Debtors hold equitable liens on the borrower payments collected prior the Petition Date (that cannot
 28 be adequately traced) for the benefit of all Direct Lenders, the same does not apply to payments collected post-
 petition that can be traced to the particular performing loan.

1 Debtors' own cases compel a finding that the Direct Loans do not amount to a "single
 2 transaction". In *In re Madigan*, 270 B.R. 749, 755 (B.A.P. 10th Cir. 2001), the court found that a
 3 "single transaction" exists for purpose of recoupment where the claims and counterclaims bear a
 4 "logical relationship" to each other. The *Madigan* court found this test is satisfied where a claim
 5 and counterclaim are based on "same operative facts." *Id.* (citation omitted). In that case, a
 6 disability plan administrator could not recoup overpayments to the since discharged Chapter 7
 7 debtor from outstanding post-discharge benefits where there were "two Reimbursement
 8 Agreements, two disability periods, and two claims separated by a two-year period of
 9 employment and a bankruptcy." *Id.* at 761 (emphasis original). The court affirmed the
 10 bankruptcy court's application of the "logical relationship" test to deny recoupment. Likewise,
 11 this Court should treat each of the Direct Loans as separate transactions and not use the
 12 "recoupment" doctrine to seize \$48,248 of Kiven's property.⁵

13 Debtors' citation to the Restatement of Trusts also does not advance the Motion. Section
 14 254 of the Restatement, as cited in the Motion, refers to one beneficiary's recovery of trust
 15 property at the expense of the other beneficiaries *of that same trust*. If Kiven had received a
 16 disproportionate share of the proceeds of the *res*, *i.e.* a Kiven Direct Loan, when compared to the
 17 other lenders on that Loan, then Debtors' citation could be a worthwhile analogy. However,
 18 Debtors somehow argue that all Direct Loans should be treated as the *res* of a single trust and all
 19 the lenders in all of the Direct Loans should be considered lenders (beneficiaries) of all of them.
 20 The Restatement of Trusts provides for no such relief.

21 Section 502(d) of the Code is equally irrelevant to the Motion. When USA Commercial
 22 distributes payments made on the Kiven Direct Loans, or their proceeds, it is not paying a "claim"
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 27 ⁵ As for *Newberry Corp. v. Fireman's Fund Ins. Co.*, 95 F.3d 1392 (9th Cir. 1996), also cited by Debtors, that case is
 28 readily distinguishable. The court found a "single transaction" where, *inter alia*, the claims all arose from a single
 contract. *Id.* at 1401-1402. In these cases, numerous contracts are involved.

1 that Kiven has against USA Commercial or any of the other Debtors. USA Commercial is a
 2 servicing conduit, contractually required to deliver borrower payments to the lenders.
 3 Accordingly, Debtors' argument that it does not have to turn over payment made on the Kiven
 4 Direct Loans because it would violate Section 502(d) is nonsensical.
 5

6 For the same reason that Section 502(d) is inapplicable to advance the Motion, Debtors
 7 could not have claims against the Direct Lenders under Section 547 of the Code. Section 547
 8 allows Debtors to avoid transfers "to or for the benefit of a creditor". As Debtors have readily
 9 acknowledged, the tender of borrower payments on Direct Loans is not paying a debt that was
 10 owed by USA Commercial. It is the delivery of the Direct Lenders' property to which USA
 11 Commercial had no legal interest.
 12

13 Lastly, Debtors' contention that fraudulent conveyance claims might exist under Sections
 14 548 and 549 of the Code is unfounded. Unless and until Debtors can show that Kiven received an
 15 "interest of the debtor in property" or "property of the estate", no fraudulent conveyance action
 16 can lie. And, Debtors cite to nothing in their Motion to suggest that property in which they had
 17 an interest was ever transferred to Kiven.
 18

**III. No Authority Exists To Grant The Relief Sought By Debtors;
It Violate All Concepts of Due Process**

20 Notwithstanding the substantive deficiencies of Debtors' purported claims, Debtors ask
 21 this Court to seize Debtors' property without a trial on the merits and presentation of evidence.
 22 Debtors claim that "equitable and legal doctrines" should be applied to the "unique
 23 circumstances" of this case as justification for the requested relief because otherwise there would
 24 be "protracted litigation" involving all the Direct Lenders. What Debtors declare as "protracted
 25 litigation" is nothing more than due process. Due process ensures that evidentiary burdens are
 26 met and litigants (such as Kiven) have the ability to review and contest such evidence. Not
 27 surprisingly, Debtors fail in their Motion to cite a single case that justifies overlooking the
 28

1 Federal Rules of Evidence and, more importantly, Kiven's constitutional rights, by authorizing
 2 the seizure of his property without suitable legal process.

3 As for evidence to support any of Debtors' alleged claims against Kiven, Debtors provide
 4 none – admissible or otherwise. Instead, Debtors' professionals have prepared a chart of alleged
 5 loan summaries through the Petition Date that were recently served on the Direct Lenders.
 6 Debtors did not provide the Direct Lenders with the underlying materials that purportedly formed
 7 the basis for the alleged overpayments found in the statements. More importantly, Debtors have
 8 not produced these materials, let alone with the proper evidentiary foundation, to this Court.
 9 When Kiven's counsel requested in writing such alleged "evidence", Debtors' counsel offered "to
 10 discuss" the bank statements, cancelled checks, and reconstructed loan histories that underlie the
 11 loan summaries that Debtors' agents prepared. But to date, Kiven has not had an opportunity to
 12 review the documents that support the alleged \$48,248 claim to judge the validity or accuracy of
 13 the loan summaries. Nor, without the filing of an adversary complaint, does Kiven have a means
 14 by which to contest Debtors' alleged legal claims.
 15

16 In short, this Court is without authority to ignore the due process demands of the
 17 Constitution.

18 **CONCLUSION**

19 USA Commercial should comply with its obligations to Kiven and pay over to Kiven and
 20 the other Direct Lenders the post-petition payments, and at the appropriate time, pre-petition
 21 payments, that USA Commercial received and receives as servicing agent on performing Kiven
 22 Direct Loans. Unless and until this Court enters a judgment in favor of Debtors and against
 23 Kiven, with Debtors meeting their evidentiary burden, *and then* Debtors request and receive the
 24 appropriate post-judgment relief, this Court cannot deprive Kiven of his property based on the
 25 possible claims that Debtors may (or may not) have against him.
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1 This Court has no authority to grant Debtors' request to seize the first \$48,248 of the
2 distributions owing to Kiven and apply them against the property USA Commercial is
3 contractually obligated to payout to him.

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5 DATED this 27 day of July, 2006.

6 By: _____
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8 Paula K. Jacobi, Esq. (IL Bar No. 1311247)
9 Andrew J. Abrams, Esq. (IL Bar No. 6271836)
10 SUGAR FRIEDBERG & FELSENTHAL LLP
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12 Chicago, Illinois 60602
13 Telephone: 312-704-9400
14 Email: pjacobi@sff-law.com
15 aabrams@sff-law.com

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17 Mark Konrad, Esq. (NV Bar No. 4462)
18 SNELL & WILMER
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20 Suite1000
21 Las Vegas, Nevada 89109
22 702.784.5203
23 Email: rkinas@swlaw.com

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25
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27
28 Attorneys for Norman Kiven